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05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 SANDON STEER,) CASE NO. C13-0325-JLR-MAT
08 Plaintiff,)
09 v.) REPORT AND RECOMMENDATION
10 CAROLYN W. COLVIN, Acting) RE: SOCIAL SECURITY DISABILITY
Commissioner of Social Security,) APPEAL
11 Defendant.)
12 _____)

13 Plaintiff Sandon Steer proceeds through counsel in his appeal of a final decision of the
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner
15 denied plaintiff's application for Supplemental Security Income (SSI) after a hearing before an
16 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative
17 record (AR), and all memoranda of record, the Court recommends that this matter be
18 REVERSED and REMANDED for further proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1962.¹ He has a GED and previously worked as a
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22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 concrete finisher. (AR 28-29, 47.)

02 Plaintiff filed an application for SSI in November 2009, alleging disability beginning
03 November 17, 2009. His application was denied at the initial level and on reconsideration.

04 On June 6, 2011, ALJ Mary Gallagher Dilley held a hearing, taking testimony from
05 plaintiff and a vocational expert. (AR 40-78.) On July 29, 2011, the ALJ issued a decision
06 finding plaintiff not disabled. (AR 20-30.)

07 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review
08 on December 21, 2012 (AR 1-4), making the ALJ's decision the final decision of the
09 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

10 **JURISDICTION**

11 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

12 **DISCUSSION**

13 The Commissioner follows a five-step sequential evaluation process for determining
14 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
15 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
16 not engaged in substantial gainful activity since the alleged onset date. At step two, it must be
17 determined whether a claimant suffers from a severe impairment. The ALJ found severe
18 plaintiff's major depressive disorder, generalized anxiety disorder, mild left wrist carpal tunnel
19 syndrome, and mild elbow ulnar nerve neuropathy. Step three asks whether a claimant's
20 impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments
21 did not meet or equal the criteria of a listed impairment.

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Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 If a claimant's impairments do not meet or equal a listing, the Commissioner must
02 assess residual functional capacity (RFC) and determine at step four whether the claimant
03 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to
04 perform light work as defined in 20 C.F.R. § 416.967(b), limited to lifting twenty pounds
05 occasionally and ten pounds frequently, and able to stand or walk for six hours and sit for six
06 hours in an eight-hour day. Plaintiff is able to use his upper left extremity to frequently push
07 and pull (he is right hand dominant), and able to handle and finger frequently with his left upper
08 extremity. He is able to climb ladders, ropes and scaffolds occasionally, to climb ramps and
09 stairs frequently, and balance, stoop, kneel, crouch, and crawl frequently. He is able to
10 perform work that involves no contact with the public and occasional superficial contact with
11 coworkers; he must work in a low stress job involving unchanging and consistent duties. With
12 that assessment, the ALJ found plaintiff unable to perform his past relevant work.

13 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
14 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
15 an adjustment to work that exists in significant levels in the national economy. With the
16 assistance of a vocational expert, the ALJ found plaintiff capable of performing other jobs, such
17 as work as a basket filler or bench assembler/small products assembler.

18 This Court's review of the ALJ's decision is limited to whether the decision is in
19 accordance with the law and the findings supported by substantial evidence in the record as a
20 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
21 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
22 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881

01 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
02 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
03 F.3d 947, 954 (9th Cir. 2002).

04 Plaintiff argues the ALJ erred at step three by failing to find his severe impairments met
05 or equaled a listing, erred in considering the medical opinion evidence, failed to consider all of
06 his restrictions in determining his RFC and improperly omitted restrictions from the vocational
07 hypothetical at step five, and erred in considering his credibility. He asks that the ALJ's
08 decision be reversed and his claim remanded for an award of benefits. The Commissioner
09 argues the ALJ's decision is supported by substantial evidence and should be affirmed.

10 Medical Opinion Evidence

11 In this particular case, although plaintiff also assigns error to the ALJ's step three
12 analysis, credibility assessment, RFC determination, and step five finding, the core issue is
13 whether the ALJ correctly evaluated the opinions of plaintiff's medical providers.

14 In general, more weight should be given to the opinion of a treating physician than to a
15 non-treating physician, and more weight to the opinion of an examining physician than to a
16 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not
17 contradicted by another physician, a treating or examining physician's opinion may be rejected
18 only for "clear and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391,
19 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may
20 not be rejected without "specific and legitimate reasons" supported by substantial evidence in
21 the record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
22 1983)). The ALJ may reject physicians' opinions "by setting out a detailed and thorough

01 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
02 making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,
03 881 F.2d at 751). Rather than merely stating her conclusions, the ALJ “must set forth [her]
04 own interpretations and explain why they, rather than the doctors’, are correct.” *Id.* (citing
05 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

06 A. Meredith Sargent, Ph.D. and Deborah Sweet M.A.

07 Dr. Sargent and Ms. Sweet conducted a psychological examination and assessment of
08 plaintiff, including psychological testing, on January 18 and February 2, 2009. (AR 245-53.)
09 The ALJ considered the evaluation, conducted approximately nine months before plaintiff’s
10 alleged onset date, to be “too remote to be material.” (AR 28.) The Court finds that this
11 reason would not be sufficient by itself to justify a disregard of this psychological evaluation,
12 and the Commissioner does not argue to the contrary. However, the ALJ also indicated that,
13 even if the evaluation was not too remote, Dr. Sargent’s opinion regarding plaintiff’s mental
14 capacity was “largely consistent” with the RFC assessed. (*Id.*) *See Stout v. Commissioner*,
15 *Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (recognizing application of harmless
16 error in Social Security context where a “mistake was nonprejudicial to the claimant or
17 irrelevant to the ALJ’s ultimate disability conclusion.”)

18 Here, the ALJ limited plaintiff to work involving “no contact with the public and
19 occasional superficial contact with coworkers; and he must work in a low stress job involving
20 unchanging and consistent duties.” (AR 25.) Plaintiff disputes the consistency of Dr.
21 Sargent’s evaluation with this RFC, arguing it fails to take into account Dr. Sargent’s opinion
22 that his anxiety and depression “may inhibit proper judgment and decisionmaking” or that his

01 “recovery process may be compromised by excessive stress”, such that a qualified therapist
02 should assist him to reinstate slowly into the workforce. (AR 247-48.) Without elaboration,
03 the Commissioner reasserts the consistency of the RFC with the limitations.

04 The Court, however, finds the ALJ’s statement that the RFC limitations and those
05 assessed by Dr. Sargent were “largely consistent” too vague to permit evaluation. There is no
06 requirement that an RFC finding directly correlate with a specific medical opinion on the
07 functional capacity in question. *Chapo v. Astrue*, 682 F.3d 1285, 1288 (10th Cir. 2012).
08 Indeed, the “final responsibility” for decisions such as the assessment of an individual’s RFC is
09 reserved to the Commissioner. Social Security Ruling (SSR) 96-5P. However, an ALJ’s
10 findings should be “as comprehensive and analytical as feasible”, so that a reviewing court may
11 properly exercise its responsibility to determine if the decision is supported by substantial
12 evidence. *Lewis v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981). The ALJ should reconsider
13 Dr. Sargent’s assessment, providing legally sufficient reasons and explaining the weight given
14 to the opinions.

15 B. Alex Fisher, Ph.D.

16 A similar error is alleged with regard to the opinion of state agency mental consultant
17 Alex Fisher, Ph.D. (AR 359-76, affirmed by Dr. Lisa Hacker at AR 409.) The ALJ found
18 “consistent with the overall record” Dr. Fisher’s opinions regarding plaintiff’s “moderate
19 difficulty with public interaction and coworker interaction as well as moderate difficulty in
20 working a normal workweek . . . little trouble with memory, completing tasks, accepting
21 supervision, and adapting to changes . . . [and] mild difficulty in completing activities of daily
22 living, moderate difficulty with social functioning, and mild difficulty in maintaining

01 concentration/persistence/pace”, giving the opinions “significant weight”. (AR 26-27.)

02 Plaintiff argues the ALJ failed to acknowledge other pertinent aspects of Dr. Fisher’s
03 opinions, including moderate limitations in the ability to maintain attention and concentration
04 for extended periods, and moderate inability to complete a normal workday or workweek.
05 However, plaintiff’s argument gives undue emphasis to the worksheet portion of Dr. Fisher’s
06 Mental RFC Assessment (MRFCA). (AR 359-60.) It is the narrative portion of the MRFCA,
07 rather than the check-box portion of the form, that should be relied upon for assessing RFC.
08 Program Operations Manual System (POMS) DI 25020.010 at B.1.² (“The purpose of section I
09 . . . on the [MRFCA] is chiefly to have a worksheet to ensure that the psychiatrist or
10 psychologist has considered each of these pertinent mental activities and the claimant’s or
11 beneficiary’s degree of limitation for sustaining these activities over a normal workday and
12 workweek on an ongoing, appropriate, and independent basis. It is the narrative written by the
13 psychiatrist or psychologist in section III . . . of [the MRFCA] that adjudicators are to use as
14 the assessment of RFC.”)

15 Nevertheless, the Court finds it necessary to recommend that the ALJ clarify the
16 consideration of Dr. Fisher’s opinions on remand. The ALJ apparently relied on Dr. Fisher’s
17 Psychiatric Review Technique (PRT) assessment of plaintiff’s “mild” difficulty in maintaining
18 concentration, persistence and pace. (AR 373.) While the ALJ is not precluded from
19 considering the results of the PRT in formulating a RFC, the regulations anticipate a more
20 detailed assessment at this stage of the sequential evaluation.

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22 ² Although the POMS “does not have the force of law” it “is persuasive authority.” *Warre v. Comm’r*, 439 F.3d 1001, 1005 (9th Cir. 2006).

01 The psychiatric review technique described in 20 CFR 404.1520a and 416.920a
02 and summarized on the Psychiatric Review Technique Form (PRTF) requires
03 adjudicators to assess an individual's limitations and restrictions from a mental
04 impairment(s) in categories identified in the "paragraph B" and "paragraph C"
05 criteria of the adult mental disorders listings. The adjudicator must remember
06 that the limitations identified in the "paragraph B" and "paragraph C" criteria
07 are not an RFC assessment but are used to rate the severity of mental
08 impairment(s) at steps 2 and 3 of the sequential evaluation process. The mental
09 RFC assessment used at steps 4 and 5 of the sequential evaluation process
10 requires a more detailed assessment by itemizing various functions contained in
11 the broad categories found in paragraphs B and C of the adult mental disorders
12 listings in 12.00 of the Listing of Impairments, and summarized on the PRTF.

08 SSR 96-8p.

09 On remand, the ALJ should reevaluate Dr. Fisher's opinions, with particular attention to
10 those set forth in the narrative portion of the functional capacity assessment, and explaining
11 what weight has been given to the opinions.

12 C. Victoria McDuffee, Ph.D.

13 Plaintiff argues that the ALJ failed to give proper credit to the opinions of treating
14 provider Dr. McDuffee, specifically, impairments in the ability to exercise judgment and make
15 decisions, the ability to relate to co-workers and supervisors, the ability to respond
16 appropriately and tolerate the pressures and expectations of a normal work setting, and the
17 ability to maintain appropriate behavior in a work setting. (AR 285.) Plaintiff contends that
18 if these findings had been accepted, he would have been found disabled at step three.
19 However, he does not specify which listing criteria he would have met.

20 Considering Dr. McDuffee's opinion, the ALJ found:

21 Victoria McDuffee evaluated the claimant in September 2009, determining that
22 he has a global assessment of functioning scale (GAF) score of 40. [AR
219-66.] Dr. McDuffee stated that he has severe difficulty with

01 decision-making, coworker interaction, and work pressure tolerance but
02 moderate difficulty with routine tasks and public interaction. Dr. McDuffee
03 indicated that he could work once he addressed his mental impairments. He
04 obtained mental treatment in March 2010, and he had significant improve[ment]
with medication. [AR 509-64.] Dr. McDuffee never reassessed him. Her
opinion was not helpful in determining his residual functional capacity with
effective treatment. Her opinion received little weight.

05 (AR 28.)

06 The Court finds the ALJ's consideration of Dr. McDuffee's opinions insufficient. The
07 Commissioner argues the ALJ appropriately disregarded this September 2009 evaluation
08 because other records show dramatic improvement in March 2011. (Dkt. 18 at 9.) However,
09 plaintiff's disability claim alleges an onset date of November 17, 2009, much closer in time to
10 Dr. McDuffee's evaluation than to March 2011. Furthermore, while the Commissioner
11 attempts to identify support for the ALJ's findings in the fifty six pages of mental health
12 treatment records cited generally by the ALJ (AR 509-64), the Court reviews the ALJ's
13 decision "based on the reasoning and factual findings offered by the ALJ – not post hoc
14 rationalizations that attempt to intuit what the adjudicator may have been thinking." *Bray v.*
15 *Comm'r of SSA*, 554 F.3d 1219, 1225 (9th Cir. 2009) (citing, *inter alia*, *Snell v. Apfel*, 177 F.3d
16 128, 134 (2d Cir. 1999) ("The requirement of reason-giving exists, in part, to let claimants
17 understand the disposition of their cases...")).

18 On remand, the ALJ should re-evaluate the opinions of Dr. McDuffee, providing legally
19 sufficient reasons supported by specific citations to the record and explaining the weight given
20 to the opinions.

21 D. Kathryn Draper, A.R.N.P.

22 Plaintiff asserts that treating provider Nurse Draper opined that she suffered from Major

01 Depressive Disorder and was “unable to work”. (AR 518.) Therefore, plaintiff argues, the
02 ALJ erred by failing to incorporate these conclusions into the RFC. However, the Court agrees
03 with the Commissioner that opinions on issues that are reserved to the Commissioner, such as
04 whether an individual is disabled under the Act, are entitled to no special significance. 20
05 C.F.R. § 404.1527(e). Furthermore, plaintiff misconstrues the significance of the statement
06 “Unable to work” in Nurse Draper’s notes. The phrase appears in the context of Nurse
07 Draper’s assessment utilizing the American Psychiatric Association’s multiaxial classification
08 system. *See* Diagnostic and Statistical Manual of Mental Disorders 27-33 (4th ed. 2000)
09 (DSM-IV-TR). Nurse Draper lists “Unable to work, poverty” at Axis IV, which represents
10 psychosocial and environmental problems that may affect the diagnosis, treatment, and
11 prognosis of mental disorders. (*Id.* at 31.) The Court finds no error in the lack of incorporation
12 of Nurse Draper’s comment into the ALJ’s RFC finding.

13 Remedy

14 “The decision whether to remand for further proceedings or simply to award benefits is
15 within the discretion of this court.” *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989).
16 Remand is proper where, as here, additional administrative proceedings could remedy the
17 defects in the decision. *See Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990) (“We
18 exercise our discretion not to award benefits because there may be evidence in the record to
19 which the ALJ can point to provide the requisite specific and legitimate reasons for
20 disregarding [the evidence].”) Although plaintiff urges this Court to remand for an award of
21 benefits, the Court finds further proceedings necessary. The ALJ, not this Court, is
22 responsible for resolving conflicts in the medical evidence. *Carmickle v. Comm’r of SSA*, 533

01 F.3d 1155, 1164 (9th Cir. 2008) (citing *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir.
02 2003)). On remand, the ALJ should reevaluate and explain the weight given to the opinions of
03 Dr. Sargent, Dr. Fisher, and Dr. McDuffee.

04 Other Issues

05 Plaintiff also assigns error to the ALJ's step three finding, assessment of his credibility,
06 RFC determination, and step five finding. A determination of the legal sufficiency and
07 substantial evidence support of those portions of the ALJ's decision will be affected by the
08 reconsideration of the medical opinion evidence as set forth above. Therefore, the Court
09 eschews consideration of these issues pending remand.

10 CONCLUSION

11 For the reasons set forth above, the Court recommends this matter should be
12 REVERSED and REMANDED for further proceedings.

13 DATED this 27th day of August, 2013.

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15 Mary Alice Theiler
16 Chief United States Magistrate Judge
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